



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Ryan Company

File: B-275304

Date: February 6, 1997

Barbara G. Werther, Esq., Watt, Tieder & Hoffar, L.L.P., for the protester.

John S. Wagner for Houston-Stafford Electric, Inc., an intervenor.

George N. Brezna, Esq., Diane D. Hayden, Esq., Timothy J. Hyland, Esq.,
Department of the Navy, for the agency.

Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

A bid should not be rejected as nonresponsive based on a pre-bidding communication in which the vendor objected to the performance schedule, where the bid as submitted took no exception to the invitation's requirements. Bid responsiveness is determined at the time of bid opening from the bid documents themselves (including extraneous submissions with the bid and material incorporated by reference).

DECISION

The Ryan Company protests the rejection of its bid as nonresponsive under Department of the Navy invitation for bids (IFB) No. N62472-90-B-8580 for the replacement of the electrical distribution system at the Marine Corps Finance Center-Housing in Belton, Missouri. The Navy rejected the bid because the agency believed, based on a pre-bid opening submission from Ryan, that the bid was ambiguous.

We sustain the protest.

The IFB was issued on August 26, 1996, with bids due on September 27. The solicitation required that the contractor begin performance within 15 calendar days and complete it within 195 calendar days after receiving award. By fax of September 18, Ryan asked the Navy to consider extending the contract's duration to 365 days primarily because some necessary items were not immediately available. That same date, the contract specialist asked the project designer to review Ryan's concerns.

On September 24, the Navy received a courier-delivered envelope from Ryan referencing the solicitation number, which the agency placed in the bid box unopened.

On September 25, Ryan sent the Navy another fax concerning a different IFB requirement, which the contract specialist also forwarded to the project designer. The project designer responded by message of September 25, including advice that the contract period should not be extended unless other vendors also indicated concerns similar to Ryan's. The contract specialist telephoned Ryan to that effect the next day, September 26.

The Navy issued an amendment on September 27 addressing Ryan's September 25 point and changing the bid opening date to October 10. On October 9, the agency extended the bid opening date yet again, to October 22, via an amendment that provided prospective bidders with certain technical information.

The Navy opened bids as scheduled on October 22; Ryan's bid (received that day), which took no exception to any IFB requirement (including performance period) was the lowest one received. At that time, the Navy also opened the envelope it had received on September 24. The envelope contained a copy of Ryan's September 18 fax concerning the contract period, and a second fax dated September 18 and showing a transmittal date of September 23, but which the Navy had no record of receiving, in which Ryan stated:

"As we had stated in our letter to you on 9-18-96, it can take up to 203 days before material would be on site for this project. The 195 day duration has not been amended. We will proceed with our bid with the belief that when this project is awarded that the notice to proceed will be held up until material is on site and the 195 days is for on site construction time only."

The Navy believes that Ryan's bid should be rejected as nonresponsive. The agency admits that the bid is responsive on its face, but maintains that Ryan's position as stated in the communication quoted above--that the required 195-day period should begin only after receipt of materials--which Ryan never retracted, renders the bid ambiguous with respect to the firm's commitment to the required performance period of 195 days after notice of award. We disagree.

Responsiveness involves whether a bid as submitted represents an offer to perform, without exception, the exact thing called for in the solicitation so that upon acceptance the contractor will be bound to perform in accordance with the IFB's

material terms and conditions. B-G Mechanical Serv., Inc., B-265782, Dec. 27, 1995, 96-1 CPD ¶ 6.¹ Responsiveness thus is determined at the time of bid opening from the face of the bid documents themselves. Id. For such purpose, bid documents include information submitted with a bid or incorporated into the bid by reference, 40 Comp. Gen. 432 (1961); Hewlett-Packard Co., B-184515, Jan. 12, 1976, 76-1 CPD ¶ 18, so that a statement in an otherwise extraneous document that qualifies the bid with respect to delivery or performance period will render the bid unacceptable. Terra Vac, Inc., supra; J. A. Wynne Co., Inc., B-181807, Nov. 18, 1974, 74-2 CPD ¶ 268. Bid documents do not, however, include unsubmitted or unreferenced items, pre-bidding concerns expressed by a vendor, or agency familiarity with a vendor's product. See, e.g., McGraw-Edison Co., B-181473, Feb. 13, 1975, 75-1 CPD ¶ 95.

As the Navy itself concedes, Ryan's bid is responsive as submitted: the bid includes only prices, the firm's acknowledgment of the IFB amendments, and the president's signature. Any concerns Ryan might have expressed earlier about the performance period are nowhere noted in the bid. It thus is irrelevant to the bid's responsiveness that 4 weeks before bid opening, in a never-received fax contained in an envelope delivered to the Navy on September 24, Ryan stated an objection to the solicitation's performance schedule. Moreover, Ryan sent that envelope to the Navy before being advised, on September 26, that the performance schedule would not be changed, and in the bid specifically acknowledged receipt of two amendments issued after that date, neither of which acceded to Ryan's position. Finally, it can make no difference to the bid's responsiveness, i.e., the acceptability of the bid on its face, that the agency did not open the envelope until the October 22 bid date--if the envelope had been opened upon its receipt it certainly would not have affected responsiveness, and we do not see how the agency's delay in opening it changes the situation.

In sum, the Navy should not reject Ryan's bid as nonresponsive. The agency's concern about Ryan's pre-bidding submissions is a matter for consideration in judging the firm's responsibility, that is, Ryan's intention to perform in accordance with the solicitation's material terms as promised in its responsive bid and as Ryan would be obligated if the bid were accepted. See Northwest Ecosystem Alliance, B-271636, July 12, 1996, 96-2 CPD ¶ 12.

The protest is sustained. We recommend that the Navy award the contract to Ryan if the firm is found responsible. We also recommend that Ryan be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, § 21.8(d)(1), 61 Fed. Reg. 39039, 39046 (1996) (to be codified at 4 C.F.R. § 21.8(d)(1)). The protester should submit its detailed and certified claim

¹An IFB's performance schedule is a material requirement. Terra Vac, Inc., B-241643, Feb. 7, 1991, 91-1 CPD ¶ 140.

for costs directly to the agency within 60 days after receipt of this decision. Bid Protest Regulations, § 21.8(f)(1), 61 Fed. Reg., supra (to be codified at 4 C.F.R. § 21.8(f)(1)).

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